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No. 115

In The
Supreme Court of the United States
OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (R. 21-44) is reported at 95 Ariz. 110, 387 P.2d 809 (1963). The Superior Court's opinion (R. 19-21) is not reported.

JURISDICTION

On August 26, 1958, Appellant Warren Trading Post Company (Trading Post) filed a complaint for declaratory judgment in

the Superior Court of Arizona in and for the County of Maricopa (R. 1-6) pursuant to Arizona Revised Statutes §§ 12-1831 et seq. (the Uniform Declaratory Judgments Act) and Arizona Revised Statutes § 41-1007, (the declaratory judgment remedy section of the Arizona Administrative Procedure Act).

The action resulted from a corrected assessment of Arizona Transaction Privilege Taxes levied upon Trading Post by the Arizona State Tax Commission (Commission) pursuant to Arizona Revised Statutes § 42-1312.A and Regulation 2.18.5 of the Commission's Combined Privilege Sales and Use Tax Regulations.

The declaratory judgment action was brought in order to secure a declaration that the statute and regulation, as construed and applied by the Commission, were invalid as a violation of Article I, Section 8, Clause 3 of the United States Constitution.

On October 7, 1959, the Superior Court entered summary judgment adverse to Trading Post (R. 10-11).

On December 4, 1959, Trading Post filed notice of appeal to the Supreme Court of Arizona (R. 14-15).

On December 4, 1963, the Arizona Supreme Court affirmed the lower court and rendered a written opinion (R. 21-44).

On January 7, 1964, the Arizona Supreme Court denied rehearing, reflected in a minute entry of the same date (R. 48).

On January 13, 1964, the Supreme Court of Arizona issued its Mandate to the Superior Court (R. 49) containing the judgment enforcing the Arizona Supreme Court's decision and opinion entered December 4, 1963. 17 Arizona Revised Statutes, Supreme Court Rule 14(a).

On April 1, 1964, in the Supreme Court of Arizona, Trading Post filed notice of appeal from the Mandate to the Supreme Court of the United States (R. 51-54).

On May 23, 1964, appellant filed with the Supreme Court of the United States its Jurisdictional Statement, the Proof of Service, a Certified Copy of the Transcript of Record, the docket fee and counsel's Entry of Appearance.

On August 20, 1964, counsel for appellees (by letter to the Honorable John F. Davis, Clerk of the United States Supreme Court) indicated his intention not to file a Motion to Dismiss.

On October 12, 1964, the United States Supreme Court noted probable jurisdiction and placed this case on the summary calendar (R. 54).

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. § 1257(2).

QUESTION PRESENTED.

The Supreme Court of Arizona has construed Arizona Revised Statutes §§ 42-1308 and 42-1312.A and Commission Regulation 2.18.5 as requiring a license for and authorizing a tax upon the privilege of making retail sales of tangible personal property to reservation Indians living upon the reservation, by an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on the Navajo Indian Reservation in the State of Arizona.

The basic question presented is:

> Whether Arizona Revised Statutes §§ 42-1308 and 42-1312.A and Regulation 2.18.5 as so construed are invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . .To regulate Commerce . . . with the Indian Tribes;"[1]

STATUTES INVOLVED

The following constitutional provisions, statutes, regulations and ordinances are applicable and are printed in full as Appendix A:

United States Constitution

Article I, § 8, cl. 3

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[1]The Stipulation of Facts before the Superior Court did not concern (1) off-reservation sales to Indians or non-Indians or (2) on-reservation sales to non-Indians. That Stipulation confined this case solely to a consideration of on-reservation sales to Indians (R-18).

United States Statutes

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264

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United States Regulations

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Arizona Enabling Act, § 20, Second, 36 Stat. 569

Arizona Constitution, Article XX, Fourth and Fifth

Arizona Revised Statutes

§§ 42-1301.2, .6, .8, .11, .13, .14 and .15; 42-1305; 42-1308.A and F; 42-1309.A; 42-1312.A

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5

STATEMENT

Arizona has had a Transaction Privilege Tax since the spring of 1935. § 1, Art. 2, Ch. 77, Session Laws of Arizona (1935). Among other things, it licenses and taxes the privilege of engaging in the business of making retail sales of tangible personal property in Arizona.

During all of this period, and before, the Congress of the United States had vested in the Commissioner of Indian Affairs the sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations governing their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 19 Stat. 200 (1876), 25 U.S.C. §§ 261-262. And, pursuant to his authority, the Commissioner of Indian Affairs has made and issued rules and regulations to

govern the conduct and affairs of the Indian Traders. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Trading without such a license subjects a person to serious penalties. 22 Stat. 179 (1882), 25 U.S.C. § 264.

In the spring of 1940 the First Assistant Solicitor of the Department of Interior (by formal written opinion) specifically held licensed traders' sales to Indians not to be subject to the Arizona Transaction Privilege Tax. 57 I.D. 124 (1940). Three years later this opinion (again formally) was reaffirmed. 58 I.D. 562 (1943). To date, there has been no change in the position of the Department of Interior.

Appellant Trading Post is a corporation organized and existing under the laws of Arizona (R. 2).[2] It is licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona, on lands leased by it from the Navajo Indian Tribe (R. 2).

On February 25, 1958, the Commission made a corrected assessment of Arizona Transaction Privilege Taxes against Trading Post under Arizona Revised Statutes § 42-1312.A and Commission Regulation 2.18.5 (R. 2-3). This $2,886.49 assessment was levied upon Trading Post's privilege of making retail sales of tangible personal property to reservation Indians from its store on the reservation during the period November 1, 1956 to December 31, 1957 (R. 2-3). But for one prior attempt in 1957, later cancelled, this was the first such assessment the Commission had made upon a licensed Indian Trader since the inception of the Arizona Transaction Privilege Tax in 1935 (R. 33; Original Transcript of Record 166).

On August 26, 1958, Trading Post brought a declaratory judgment action in the Supreme Court of Arizona in and for the County of Maricopa (R. 1-6). The Superior Court held against

[2]Fact Stipulation No. 3 provides that all facts alleged in Trading Post's complaint are admitted, except for two which are not pertinent to this Statement of the Case (R. 18).

Trading Post, basing its opinion largely upon the following reasoning:

> "It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* [the Court having previously cited *Thomas v. Gay*, 169 U.S. 264 in support of that proposition] and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned." (Emphasis the court's.) (R. 20).

The Superior Court saw no difference at law between the state's right to levy a personal property tax upon the personal property of an Indian Trader, and a state's right to levy a privilege tax on the privilege of engaging in commerce with the Indian Tribes.

Trading Post then appealed to the Arizona Supreme Court (R. 14-15). The majority opinion of that Court affirmed the opinion of the trial court, while the dissent adopted and presented Trading Post's position in full (R. 22-44).

The majority opinion's conclusion is that the tax is neither burdensome on nor inconsistent with federal purposes or laws (R. 30).

The dissent is based on the proposition that any privilege tax upon the privilege of engaging in commerce with the Indian Tribes is prohibited by Article I, Section 8, Clause 3 of the United States Constitution, since Indian commerce, like interstate and foreign commerce, is an area which has been reserved exclusively for (and actually occupied by) federal regulation (R. 31, 34-37).

SUMMARY OF ARGUMENT

I INTRODUCTION:

It is appellant's position that Arizona may not license and tax the privilege of engaging in Indian commerce for two principal reasons: First, just as with interstate and foreign commerce, the national character of Indian commerce requires that it be regulated only by Congress; and, second, Indian commerce is closed to state regulation because Congress already has occupied the field with a comprehensive system of federal law.

II THE QUESTION IS ONE OF FIRST IMPRESSION SINCE, UNTIL RECENTLY, THE STATES HAVE NOT ATTEMPTED TO TAX THE PRIVILEGE OF ENGAGING IN INDIAN COMMERCE:

The question is one of first impression under Article I, Section 8, Clause 3, the Commerce Clause of the United States Constitution. It arises from Arizona's attempt to license and tax Indian Traders for the privilege of making sales on Indian reservations to reservation Indians.

Until Arizona's recent assessment giving rise to this case, all of the states refrained from taxing Indian commerce, thus abiding by federal law as interpreted by the Department of Interior.

III THE COMMERCE CLAUSE SHOULD BE HELD TO PROHIBIT A STATE PRIVILEGE TAX UPON INDIAN COMMERCE FOR THE SAME REASON IT HAS LONG BEEN HELD TO PROHIBIT SUCH A TAX UPON INTERSTATE AND FOREIGN COMMERCE: THE NATIONAL CHARACTER OF ALL THREE COMMERCIAL FIELDS REQUIRES THAT THEY BE REGULATED SOLELY BY CONGRESS:

A. Sales made on Indian Reservations to Reservation Indians constitute "Commerce . . . with the Indian Tribes":

By Stipulation (R. 18), appellant's claim for tax shelter is limited to those of its sales which are made on the reservation to reservation Indians. The Constitutional phrase "Commerce with the Indian Tribes" includes commerce with individual members of those tribes. *United States v. Holliday*, 3 Wall. 407, 417 (1866). Any narrower interpretation would frustrate the purposes of the Commerce Clause.

B. The Arizona Tax is a Privilege Tax:

Arizona's tax is self-described as a "privilege tax" (Arizona Revised Statutes § 42-1308.A) and repeatedly has been characterized as such by the Arizona Supreme Court. *Warren Trading Post Company v. Moore*, 95 Ariz. 110, 113, 387 P.2d 809, 811, 812 (1963); *State Tax Commission v. Quebedeaux Chevrolet*, 71 Ariz. 280, 284, 226 P.2d 549, 552 (1951). It is not in lieu of any other tax. Arizona Revised Statutes, Title 42, Taxation. Therefore, the label "privilege tax" is entitled to great weight. Indeed, it may be conclusive.

C. A state may not tax the privilege of engaging in interstate or foreign commerce:

While a state is not precluded from levying a privilege tax upon certain local activities incident to commerce among the states, *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951); *General Motors Corporation v. Washington*, 32 LW 4482, ... U.S. ...., 12 L.ed 2d 430 (1964), it is "beyond dispute that a state may not lay a tax on the privilege of engaging in interstate commerce. . . ." *Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959). See *General Motors Corporation v. Washington, supra; Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

It is equally well settled that a state may not lay a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

The purposes and objects to be achieved in these areas concern the nation as a whole. Being national in character they can be attained only by federal control. *Cooley v. Board of Wardens*, 12 How. 299, 319 (1851); *Brown v. Maryland, supra; M'Culloch v. Maryland*, 4 Wheat. 316 (1819). They would be impaired or destroyed if individually regulated by each of the fifty states.

D. The rule prohibiting state privilege taxes upon interstate and foreign commerce should apply with equal force to Indian commerce:

This Court previously has recognized that Congress' reserved power over Indian commerce is equal to its power over interstate and foreign commerce. *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903); *United States v. 43 Gallons of Whiskey (United States v. Lariviere)*, 23 Wall. 192, 194 (1876); *Dick v. United States*, 208 U.S. 340, 356 (1908).

The need for Congressional power in all three commercial

fields is occasioned by the national objects and purposes to be achieved in each case.

The optimum economic growth of the nation is a principal goal of federal regulation of interstate and foreign commerce. Its counterpart in the field of Indian commerce is the optimum economic development of the tribes in preparation for final assimilation into our society. This goal cannot be achieved by the attempted separate and uncoordinated regulation of Indian commerce by the twenty-five states containing Indian reservations.

IV. INDIAN COMMERCE IS CLOSED TO STATE REGULATION BECAUSE CONGRESS HAS PREEMPTED THE FIELD WITH A COMPREHENSIVE SYSTEM OF FEDERAL LAW:

A. Congress has occupied the field:

Even if the field of Indian commerce were otherwise open to concurrent state regulation (which appellant denies), it has been preempted by a comprehensive system of federal law. This system of law governs every phase of such commerce and vests in the Commissioner of Indian Affairs the sole authority to regulate it. 19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). The application of the Arizona privilege tax to Indian commerce is inconsistent with and contradictory to the provisions of the federal law in the field of Indian commerce and the objects and purposes to be attained thereby.

B. The tests for total occupation of the field are met:

The degree of Congressional occupation of the field of Indian commerce meets each of this Court's tests for total preemption of that field, thus precluding any state participation

therein. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

C. The Papago Tax illustrates the need to prohibit the states from attempting to regulate Indian commerce:

Appellant's motion for rehearing (R. 44-46) before the Arizona Supreme Court in this case apprised that Court that subsequent to oral argument the Papago Tribal Council enacted a Privilege Tax upon (among others) Indian Traders doing business on the Papago Reservation. Ordinances Nos. 43,44 of the Papago Council; Approval Letters of the Department of Interior (Appendix B).

The joint operation of the Arizona and Papago privilege taxes upon the same Indian Traders for the privilege of conducting the same commerce will discourage qualified persons from being traders on the Papago Reservation, or discourage commerce among the Papagos, or necessitate the repeal of the Papago tax to lessen the commercial burden. The problems incident to such concurrent taxation illustrate the reason that the Constitution reserved to Congress the regulation of Indian commerce.

V. ONLY BY EXPRESS CONGRESSIONAL GRANT MAY THE STATES DIMINISH THE RIGHT OF INDIANS TO GOVERN THEMSELVES. THE FIELD OF INDIAN COMMERCE HAS NOT BEEN THE SUBJECT OF SUCH A GRANT:

Because of the considerable burdens which accompany the power, Arizona has failed to accept, and instead expressly has disclaimed jurisdiction over reservation Indians even in those areas (civil and criminal court jurisdiction) which Congress is willing to grant to the states. *Williams v. Lee*, 358 U.S. 217, 222-223 (1959); Act of Aug. 15, 1953, c. 505 § 6, 7, 67

Stat. 590; Arizona Enabling Act § 20, 36 Stat. 569; Art. XX, Fourth, Arizona Constitution.

Indian commerce has not been the subject of a Congressional grant of power to the states. Without such a specific Congressional grant, no power over Indian commerce can be presumed for such would not only interfere with Indian self-government (as demonstrated by the Papago tax) but would impair the right to regulate such commerce reserved to Congress by the Constitution. *Williams v. Lee, supra; Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1962).

CONCLUSION:

For the foregoing reasons it is respectfully submitted that Arizona's requirement of a license and a tax upon Indian traders for the privilege of making sales on Indian reservations to reservation Indians violates the Commerce Clause of the Constitution. Accordingly, the judgment of the Arizona Supreme Court should be reversed.

ARGUMENT

I INTRODUCTION:

In support of its position that Arizona may not license or tax the privilege of engaging in Indian commerce, appellant will show that: the sales transactions in question constitute "Commerce with the Indian Tribes" as contemplated by Article I, Section 8, Clause 3 of the United States Constitution; the Arizona tax is a privilege tax; the same considerations which prohibit the imposition of a privilege tax upon interstate and foreign commerce apply equally to Indian commerce; the field of Indian commerce has been occupied fully by federal regulation, thus precluding concurrent regulation by the states; the recent Papago Tribal privilege tax illustrates the conflicts which result from concurrent regulation; and, finally, regulation of Indian commerce has not been the subject of a specific grant by Congress to the states — the only method by which the states could obtain such power.

II THE QUESTION IS ONE OF FIRST IMPRESSION SINCE, UNTIL RECENTLY, THE STATES HAVE NOT ATTEMPTED TO TAX THE PRIVILEGE OF ENGAGING IN INDIAN COMMERCE:

Arizona's transaction privilege tax has been in substantially its present form since 1935. Ch 77, Session Laws of the Regular Session of the Twelfth Legislature of the State of Arizona, 1935. Of the twenty-five states, including Arizona, which contain Indian reservations[1], all but four[2] have a privilege or similar tax measured by gross proceeds of sales. Most of these taxes have been in effect since the depression years of

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[1]These states are Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

[2]Idaho, Minnesota, Nebraska and Oregon. 1 C.C.H. Sales Tax Reporter, par. 301, pp. 601-07.

the middle 1930's. 1 C.C.H. Sales Tax Reporter, par. 125, p. 511. In view of the number of interstate and foreign commerce privilege tax cases which have reached this Court in the last nineteen or twenty years,[3] it seems appropriate to consider why this is the first Indian commerce privilege tax case to reach this Court.

It is submitted that the Act of Congress vesting in the Commissioner of Indian Affairs the sole authority to regulate Indian commerce, as well as two formal opinions of the United States Department of Interior dealing specifically with the rights of the states to levy such taxes, have had their effect upon the states. See 19 Stat. 200 (1876), 25 U.S.C. § 261; 57 I.D. 124 (1940); 58 I.D. 562 (1943).[4] The position of the Department of Interior is reflected in a portion of the oft-quoted summary of its 1940 opinion (57 I.D. 124, 129):

> "1. Persons trading with the Indians on Indian reservations are not subject to the Arizona sales tax laws. However, where such traders are non-Indians, they are subject to the sales tax laws on so much of their business as is carried on with other non-Indians. Traders off an Indian reservation are subject to the State sales tax laws whether or not they are Indians or dealing with Indians."

And, in 1948, the Department of Interior expressed the opinion that the tribes themselves are prohibited from placing conditions and restrictions upon Indian commerce, absent specific federal consent. 60 I.D. 176 (1948).

Until recently, all of the states have refrained from taxing the privilege of engaging in Indian commerce. Some states have acknowledged officially their lack of jurisdiction in this

[3] For example, see cases collected in *Portland Cement v. Minnesota*, 358 U.S. 450 (1959).

[4] These opinions are cited with approval in Cohen, *Handbook of Federal Indian Law*, United States Department of Interior (1945), pp. 263-264 and *Federal Indian Law*, United States Department of Interior (1958), pp. 867-873.

field. Ch. 670, Laws of 1959, as amended by ch. 826, Laws of 1961, effective July 1, 1961, North Carolina Statutes (4 C.C.H. State Sales Tax Reporter, par. 58-125b); *Neah Bay Fish Co. vs. Krummel,* 101 P.2d 600 (Wash. 1940); Opinion 54-40 of the Attorney General of Arizona, dated March 4, 1954.

Since the 1958 reversal of Arizona's position (reflected in the assessment made upon the appellant herein and culminating in this appeal), however, both California and New Mexico have asserted the right to tax the privilege of engaging in Indian commerce.[5] The other states having sales taxes and Indian reservations soon can be expected to follow suit. It is clear the question is ripe for settlement by this Court.

III THE COMMERCE CLAUSE SHOULD BE HELD TO PROHIBIT A STATE PRIVILEGE TAX UPON INDIAN COMMERCE FOR THE SAME REASON IT HAS LONG BEEN HELD TO PROHIBIT SUCH A TAX UPON INTERSTATE AND FOREIGN COMMERCE: THE NATIONAL CHARACTER OF ALL THREE COMMERCIAL FIELDS REQUIRES THAT THEY BE REGULATED SOLELY BY CONGRESS:

A. Sales made on Indian Reservations to Reservation Indians constitute "Commerce . . . with the Indian Tribes":

As a necessary predicate to appellant's position that a state may not tax the privilege of engaging in Indian commerce, it must be established that the type of sale here in question constitutes such commerce. Appellant's claim for tax shelter is limited by Stipulation (R. 18) to those of its sales which are

[5]Opinion 58/209 of the Attorney General of California, issued December 31, 1958, reversing opinion NS 799 in effect since January 13, 1958; *Paul E. Brink, dba Brink Trading Co. v. Bureau of Revenue, State of New Mexico,* No. 7670 pending in the Supreme Court of the State of New Mexico, on appeal from the District Court of Santa Fe County, New Mexico, Cause No. 32849.

made on the reservation to reservation Indians. This position is consistent with the Interior Department's ruling. 57 I.D. 124 (1940).

Indian commerce is not confined to commerce with tribal governments any more than interstate or foreign commerce is confined to commerce between state or foreign governments. Sales made on the reservations to individual members of the tribes constitute "Commerce with the Indian Tribes" as those words are used in Article I, Section 8, Clause 3 of the United States Constitution. In *United States v. Holliday*, 3 Wall. 407, 417 (1886) this Court stated:

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes."

See also: *United States v. 43 Gallons of Whiskey* (*United States v. Lariviere*), 23 Wall. 188, 194 (1876).

The federal objects to be obtained by Congressional regulation of foreign, interstate and Indian commerce can not be achieved by a narrower interpretation.

B. The Arizona Tax is a Privilege Tax:

In addition, it is necessary to appellant's position to establish that the description "privilege tax" is properly applicable to the tax in question.

The Arizona tax is self-described as a privilege tax. It forbids engaging in the businesses therein designated until a privilege license has been obtained. Arizona Revised Statutes § 42-1308.A provides in pertinent part:

> "Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege

license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. . . ."

In its decision in this case, the Arizona Supreme Court characterized the tax as a privilege tax. *Warren Trading Post Company v. Moore,* 95 Ariz. 110, 113, 387 P.2d 809, 811-812 (1963). It has been repeatedly so characterized by that Court in the past. *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 284, 226 P.2d 549, 552 (1951); *Arizona State Tax Commission v. Ensign,* 75 Ariz. 220, 223, 254 P.2d 1029, 1031, *reh. denied* 75 Ariz. 376, 257 P.2d 392 (1953); *Arizona State Tax Comm. v. Garrett Corporation,* 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955); *State Tax Commission v. Consumers Market, Inc.,* 87 Ariz. 376, 379, 351 P.2d 654, 655 (1960); *Combustion Engineering v. Arizona State Tax Comm.,* 91 Ariz. 253, 259, 371 P.2d 879, 883 (1962).

All other Arizona taxes (real and personal property, income, luxury, etc.) are levied alike upon those Arizonans who do and those who do not pay a privilege tax. Privilege taxpayers, by reason of paying such tax, are neither given credit against, nor exempted from, any other tax. Arizona Revised Statutes, Title 42, Taxation.

If a state "privilege tax" does not replace a property or other tax and if the state legislative label, "privilege tax," and long continued state supreme court interpretation are identical, such designation is entitled to great weight. Indeed, it may be conclusive. *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951); *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359 (1954); *Railway Express Agency v. Virginia,* 358 U.S. 434 (1959).

C. A state may not tax the privilege of engaging in interstate or foreign commerce:

The third step in showing that the states may not tax the privilege of engaging in Indian commerce involves an ex-

amination of this Court's holdings in the related fields of interstate and foreign commerce.

Balancing the equities in the field of interstate commerce never has been an easy task. On the one hand, the states need local revenue. To the extent they render services it would seem their claim to a commensurate portion of interstate revenue has merit. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). On the other hand, the framers of the Constitution, in giving Congress the right to regulate interstate commerce, recognized that trade barriers between the states could impede the economic development of the nation.

Over the years this Court has permitted a variety of state taxes whereunder interstate business can be made to pay its own way[6]. However, "it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce". *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See: *General Motors Corporation v. Washington*, 32 L.W. 4482, ... U.S. ....., 12 L.ed 2d 430 (1964); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389 (1952); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1924); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1924).

It is equally well settled that a state may not lay a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

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[6]Use taxes, *Turner v. Wright*, 11 Ill. 2d 161, 142 N.E. 2d 84, *appeal dismissed*, 355 U.S. 65 (1957); fairly apportioned net income taxes, *Portland Cement v. Minnesota*, 358 U.S. 450 (1959); and the imposition of sales taxes upon local activities incident to interstate commerce, *Norton v. Department of Revenue*, 340 U.S. 534 (1951); *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010, *aff'd*, 352 U.S. 806 (1956); *General Motors Corporation v. Washington*, 32 LW 4482, ... U.S. ....., 12 L.ed 2d 430 (1964).

It is submitted that the basic factor which historically has caused this Court to prohibit the states from directly licensing and taxing the privilege of engaging in interstate and foreign commerce is the national character of such commerce. Otherwise stated, the purposes and objects to be achieved in these areas affect the nation as a whole and thus are of a nature which can either be best attained or only attained by federal control. They could be impaired or destroyed if individually regulated by each of the fifty states. As stated by Justice Curtis in *Cooley v. Board of Wardens,* 12 How. 299, 319 (1851):

> "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." See also annot. in 82 L.ed 14-20 for collection of cases respecting the "national character of commerce" doctrine.

Chief Justice Marshall considered this proposition and the historical background which required it in *Brown v. Maryland,* 12 Wheat. 419, 445, 446 (1827):

> "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. . . . Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would

tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

Thereafter, the concept of the national character of foreign and interstate commerce became so basic a part of our legal philosophy that ninety years later, in *Crew Levick Company v. Pennsylvania,* 245 U.S. 292 (1917), the Court found it necessary only to offer case citations, without discussion, to support its view that a state tax levied directly upon foreign commerce is prohibited. And, in the 1951 case of *Spector Motor Service v. O'Connor,* 340 U.S. 602, the citation of *M'Culloch v. Maryland,* 4 Wheat. 316 (1819) alone was deemed sufficient to support the Court's view that interstate commerce must be free from state taxation. Thus, once it is affirmatively determined that the "operating incidence" of the tax is directly upon the privilege of engaging in interstate or foreign commerce, the national character of such commerce and the reasons requiring its exclusive regulation by Congress are assumed.

D. The rule prohibiting state privilege taxes upon interstate and foreign commerce should apply with equal force to Indian commerce:

We submit that Indian commerce is as national in character as interstate and foreign commerce. A brief examination of some of the principal purposes and objects of each of these fields of commerce demonstrates the point. For example, federal control of commerce with the Indian tribes is designed to aid the Indians in their economic development.[7] The interstate counterpart of this is federal protection of free trade among the states to aid in the overall development of the national economy. And federal control of foreign commerce (ranging from maintaining open trade in some cases to providing tariffs or embargos in others) also is designed to preserve and enhance the economic development of the country

[7]See discussion of the purposes of Congressional legislation for Indians in *Williams v. Lee,* 358 U.S. 217, 220-222 (1959).

as well as to serve the needs of economic diplomacy.

In each case, the character of the subject being considered is national. No one would contend that the question of tariffs should be left to the separate decisions of the individual states; or that the separate states should be permitted to determine individually whether there should be trade barriers among them. Separate state interests might differ from the national interest. Therefore, decisions based upon such separate interests might threaten the national welfare. The problems involved concern not some but all of the states.

Indian commerce is equally national in scope. Its proper regulation should not be left to the will of the separate states. Recognizing that the power to license and tax a privilege "is the power to control or suppress its enjoyment," *Murdock v. Pennsylvania,* 319 U.S. 105, 112 (1943), the attempted individual regulation of Indian commerce by the twenty-five states containing Indian reservations[8] soon would lead to chaos.

For instance, on the Navajo reservation, which stretches across Arizona, New Mexico and Utah, what if each of those states charged traders differently for the privilege of conducting Indian commerce (or one made a charge while the others did not)? What if one prohibited the sale of certain commodities and the others did not? What if one licensed any person who chose to be a trader and was willing to pay a license fee while the others required a showing of high moral character? What if one or all of these states forbid any commerce at all?[9] The possibilities posed by these questions demonstrate that any program for the commercial protection and development of the Indian tribes, by its nature, must not be left to the separate decisions of twenty-five different states.

While this Court never has considered whether a state may tax the privilege of engaging in Indian commerce, its past de-

[8]For a list of such states, see p. 13, fn. 1, *supra.*

[9]See pp. 23, 24, *infra;* 25 U.S.C. §§ 261-264; 25 C.F.R. §§ 251-252.

cisions reflect an acknowledgment of the national character of such commerce.'

The Court early declared that Congress has the supreme right to regulate commerce with any Indian tribe although the tribe dwells within the territorial confines of a state. *United States v. Holliday,* 3 Wall. 407, 418 (1866); *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824). Further, as long as the Indians remain a distinct people with existing tribal organizations, laws and customs, Congress has the power to say with whom and on what terms they shall deal. *Williams v. Lee,* 358 U.S. 217 (1959); *United States v. 43 Gallons of Whiskey (United States v. Lariviere),* 23 Wall. 188, 195 (1876). The power of Congress to govern Indian commerce stems not only from express Constitutional authorization but from long continued legislative and executive usage and the duty to exercise a fostering care and protection over dependent communities. *United States v. Sandoval,* 231 U.S. 26, 45, 46 (1913); *United States v. Kagama,* 118 U.S. 375, 383, 384 (1886). Only Congress (and not the courts) properly can determine when the need for such guardianship shall cease. *Tiger v. Western Investment Co.,* 221 U.S. 286, 313-315 (1911).

It has been said that the power of Congress over Indian commerce is not less than its power over interstate commerce, *Hanley v. Kansas City Southern Ry. Co.,* 187 U.S. 617, 619 (1903); that it is exclusive, unfettered and as broad as the power to regulate commerce with foreign nations, *United States v. 43 Gallons of Whiskey, supra* at 194; and that it is much broader than that over commerce among the states, 1 Willoughby, *The Constitution of the United States* (2d ed.) § 226, p. 398; Prentice and Egan, *The Commerce Clause of the Federal Constitution,* p. 342 (1898). Mr. Justice Harlan, writing for this Court in *Dick v. United States,* 208 U.S. 340, 356 (1908), quoted with approval from *United States v. 43 Gallons of Whiskey* as follows:

" 'Chief Justice Marshall, . . . with a force of reasoning

and an extent of learning rarely equaled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of a state within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. . . .'"

We submit, therefore, that both logic and law support the same absolute prohibition against the states licensing and levying a privilege tax upon Indian commerce as that which has long existed with respect to both interstate and foreign commerce. Even had Congress not occupied the field, it is appellant's position that Indian commerce should be free from state control.

IV INDIAN COMMERCE IS CLOSED TO STATE REGULATION BECAUSE CONGRESS HAS PREEMPTED THE FIELD WITH A COMPREHENSIVE SYSTEM OF FEDERAL LAW:

A. Congress has occupied the field:

It is appellant's alternate position, however, that the Congress has fully occupied the field with a comprehensive system of federal law which not only governs every phase of Indian commerce but specifically vests the sole authority to regulate it in the Commissioner of Indian Affairs. 19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179

(1882), R.S. § 2132, 25 U.S.C. §§ 261-264; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958), Appendix A. Accordingly, any concurrent state regulation of Indian commerce is necessarily "inconsistent with or burdensome to federal purposes or laws" (being the test declared applicable by the majority opinion of the Arizona Supreme Court (R. 30)). Thus, even pursuant to such test, a state license and privilege tax upon the privilege of conducting Indian commerce is invalid.

The first section of the Congressional Act vesting power in the Commissioner of Indian Affairs merits being set forth in full:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Aug. 15, 1876, c. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261.

The succeeding sections of the Act permit trade with the Indians only by those approved by the Commissioner and only under such rules as the Commissioner may prescribe for Indian protection; give the President of the United States the power to prohibit all Indian trade and revoke all licenses therefor whereever the public interest requires; and subject anyone who attempts to engage in Indian trade on the reservation without a license to the forfeiture of all of his merchandise and a penalty of $500.00. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066, Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009, 25 U.S.C. § 262; R.S. § 2132, 25 U.S.C. § 263; R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179, 25 U.S.C. § 264.

Federal regulations, in addition to paraphrasing these sections, prohibit those employed in Indian Affairs from being traders except under specified conditions; permit only specified small

purchases by government employees of articles offered for sale by Indians; prohibit the sale of arms and ammunition to the Indians except upon permission of the Superintendent; set forth what must be included in the application to be licensed as an Indian trader, including testimonials as to character, the proposed location of the trading post, the amount of money to be invested and the names of the clerks to be employed; set forth the bonding requirements; restrict licenses to periods of one year on some reservations while permitting a longer period on the Navajo, Zuni and Hopi Reservations; give the Superintendent the right to close unlicensed stores; confine trade to the licensed premises; prohibit gambling on the premises; prohibit trade in antiquities; prohibit tobacco sales to minors and sales of intoxicating liquors and certain dangerous drugs to anyone; prohibit Sunday trading; require fair prices and prescribe the conditions under which credit may be advanced and pawn or pledges of personal property accepted as security. 25 C.F.R. §§ 251.1; 252.1; 251.2; 252.2; 251.3; 252.3; 251.5; 252.4; 251.6; 252.5; 251.8; 251.9; 252.6; 251.10; 252.9; 251.11; 251.12; 252.10; 252.11; 251.13; 251.14; 252.13; 251.21; 252.15; 251.25; 252.24; 251.17; 251.18; 251.19; 252.26; 251.22; 252.16.

Some of the federal purposes to be achieved by these regulations are to provide for the Indians an opportunity to purchase needed and non-harmful goods and wares at fair prices under fair credit terms from convenient locations operated by people of high moral character who are subject to complete federal control.

The attempt by Arizona to grant to an Indian trader the privilege of selling anything, at any price, and under any credit terms anywhere on the reservation is inconsistent with these concepts. Even if Arizona attempted to grant this privilege only to those already licensed and approved by federal regulations, the State has not given anything for which it can ask a return. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435,

444 (1940), cited with approval in *General Motors Corp. v. Washington*, 32 L.W. 4482, 4484, ... U.S. ....., 12 L.ed 2d 430, 435 (1964). Only the authority actually conferring a privilege should be permitted to impose conditions upon it. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898); *Arenas v. United States*, 140 F. Supp. 606, 608 (1956), *aff'd sub. nom. Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957). The federal government, not the State of Arizona, actually confers upon Indian traders the privilege of trading with the Indians.

B. The tests for total occupation of the field are met:

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231 (1947), this Court considered whether federal regulation of grain elevators had preempted that field from concurrent regulation by the states. The Court noted that (as opposed to Indian commerce) regulation of grain elevators was a field traditionally occupied by the states and, therefore, state police powers were not to be superseded by federal regulation unless that was the clear and manifest purpose of Congress.

The Court set forth the following tests to determine whether federal preemption had occurred: Is the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it"? Does "the Act of Congress . . . touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"? Does "the object sought to be attained by federal law and the character of the obligations imposed by it . . . reveal the same purpose"? Might "the state policy . . . produce a result inconsistent with the objective of the federal statute"? Might "state and federal regulations collide"? See also: *Pennsylvania v. Nelson*, 350 U.S. 497, 501-505 (1956).

Each of these questions (reflecting the Court's tests in the *Rice* case) requires an affirmative answer when applied to

the instant case and thereby demonstrates total federal occupation of the field. And when it is considered that this case concerns commerce (not state police power) and a field traditionally occupied by the federal government alone (rather than by the states alone) these answers become an even more persuasive reflection of federal preemption.

C. The Papago Tax illustrates the need to prohibit the states from attempting to regulate Indian commerce:

In appellant's motion for rehearing (R. 44-46) before the Arizona Supreme Court in the instant case, appellant apprised that Court that after oral argument the Papago Tribal Council had enacted its own Privilege Tax Ordinances, levying a tax of 3% upon the gross receipts from sales made within the confines of the reservation.[10]

An inspection of the ordinances and "no objection" letters from the Department of Interior indicates the position of the Papago Tribe that: Arizona has no jurisdiction to levy a privilege tax on the Papago Reservation (first "whereas" of Ordinance 43); by Congressional enactment, the sole authority over all aspects of Indian trade or commerce resides in the Commissioner of Indian Affairs (second "whereas" of Ordinance 43, first "whereas" of Ordinance 44); the Papago Constitution provides for the passage of Ordinances essential to Tribal welfare (third "whereas" of Ordinance 43, second "whereas" of Ordinance 44); the tax is necessary to meet the financial needs of the Tribe (Fourth "whereas" of Ordinance 43, third of Ordinance 44); it will be administered by the Tribal Council and

[10]Papago Tribal Ordinance 43, its correcting Ordinance 44, and the Department of Interior's "no objection" letters relating to each, are reprinted as Appendix B to this brief. The apparent difference between the two Ordinances is that the first (Ordinance 43) attempts to remit to the State of Arizona that portion of the total receipts estimated to be applicable to reservation sales to non-Indians. The second Ordinance eliminates these provisions.

enforced by the Tribal Courts or other courts of competent jurisdiction (Sections 7, 8, Ordinance 43, sections 4, 5, Ordinance 44); and the concluding paragraph of each Ordinance indicates that it becomes effective only "after its approval by the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe." The position of the Department of Interior is consistent with the foregoing as reflected by its "no objection" letters and by the Solicitor's May 20, 1948 Memorandum on the subject, 60 I.D. 176.

The Papago tax also reveals an important aspect of the federal government's Indian policy. The federal government gradually has given more responsibility for Indian affairs to the Indian tribes. See Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 46, 25 U.S.C. § 636. When the Department of the Interior allowed the Papago Tribal Council to levy such a tax, it was part of the federal government's general program to make Indians more responsible for their own affairs. Permitting Arizona to duplicate the Papago tax would conflict with federal Indian policy and would inhibit the growth of tribal self-government.

An example of a serious practical problem which will arise if both the Papago Tribal tax and the Arizona tax are permitted to apply is provided by the distribution of the traders' resultant increase in the cost of doing business. To the extent that the Commissioner of Indian Affairs permits the trader to raise his prices (25 U.S.C. § 261; 25 C.F.R. § 251.22), the Papago Indians will bear the brunt of the tax burden. To the extent the Commissioner refuses, the burden will be borne by the Papago Reservation traders, who then become the only Arizona retailers prohibited by law from "passing on" the privilege tax, and thus the subject of discrimination in both the legal and practical sense. At some level of taxation the effect will be to (1) discourage qualified persons from being Indian traders on

the Papago Reservation, or (2) discourage commerce among the Papagos, or (3) compel the repeal of the Papago tax in order to lessen the burden on commerce, or (4) some combination of these. And unless the Arizona tax is prohibited, such results will be beyond the power of the Commissioner to prevent. Identical results will occur on other reservations if and when other tribes, with the consent of the Commissioner, adopt privilege taxes.

The Papago tax illustrates the dangers of state participation in the field of Indian commerce by showing how the resulting collisions directly threaten that commerce. It illustrates why the authors of the Constitution reserved the regulation of Indian commerce to the Congress.

V ONLY BY EXPRESS CONGRESSIONAL GRANT MAY THE STATES DIMINISH THE RIGHT OF INDIANS TO GOVERN THEMSELVES. THE FIELD OF INDIAN COMMERCE HAS NOT BEEN THE SUBJECT OF SUCH A GRANT:

In *Williams v. Lee,* 358 U.S. 217 (1959), this Court prohibited an Indian trader on the Navajo Reservation in Arizona from suing a Navajo Indian and his wife in the State Superior Court to collect for goods sold to them on credit. The opinion refers to the act of Congress which permits the states to assume concurrent civil and criminal jurisdiction on Indian reservations providing the states appropriately amend their constitutions or statutes. Act of Aug. 15, 1953, c. 505 §§ 6, 7, 67 Stat. 590. Reference is further made to Arizona's express disclaimer of such jurisdiction in its Enabling Act and Constitution. Arizona Enabling Act § 20, 36 Stat. 569; Arizona Constitution, Art. XX, Fourth, (Appendix A). And, on the basis of the legislative history, the opinion states at 222-223:

> "To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."

The Court makes it clear that if the authority of Indian governments over their own reservations is to be diminished, the Congress must be the one to do it, citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566 (1903). Having failed to meet the Congressionally fixed conditions precedent, Arizona's claim to jurisdiction must fail.

Applying this rule to Indian commerce, there has been no act of Congress granting to the states the right to exercise concurrent control.[11] Yet Indian commerce is as inherent a part of Indian self-government as court jurisdiction. Therefore, under the rule of *Williams v. Lee, supra,* no concurrent state control of Indian commerce can be presumed. And Arizona's history of non-acceptance of responsibility even in a Congressionally permitted area of dual control (court jurisdiction) underscores Arizona's absence of authority in the field of Indian commerce.

In reviewing the history of past decisions in the field of Indian law, this Court indicated in *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962), that state laws may not apply where they would interfere with reservation self-government or impair a right granted or reserved by federal law. The Arizona Privilege Tax interferes with reservation self-government as evidenced by its conflict with the Papago tax. The Arizona Privilege Tax impairs the right to regulate Indian commerce reserved to the Congress by the Constitution, as evidenced by its conflict with federal regulation of traders.

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[11]The Buck Act [61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110] is not a grant of power to the states to tax Indian commerce on an Indian reservation. The only court which has considered the question of the applicability of that Act to an Indian reservation decided that the statutory definition of "federal area" (4 U.S.C. § 110(e)), does not include an Indian reservation and, therefore, a municipal sales tax could not be levied against a business on the reservation. *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 324, 334, 361 P.2d 950, 955-956 (1961). In any event, the immunity from state taxation of an Indian trader is not a consequence of his physical situs on an Indian reservation but of the commerce he conducts with the Indian tribes, the regulation of which is exclusively within the domain of the United States. 58 I.D. 562 (1943).

CONCLUSION:

Arizona is the first state to attempt to license and tax the privilege of engaging in Indian commerce. New Mexico and California have followed suit. Other states soon may make similar attempts. Such separate and uncoordinated regulation of Indian commerce by the twenty-five states containing Indian reservations would constitute a serious interference with the power reserved to Congress to regulate commerce with the Indian tribes.

The resolution of this problem is necessary to fix the boundaries of power among the Federal Government, the States and the Indian tribes with respect to the control of Indian commerce. Only a determination prohibiting the states from licensing and levying a privilege tax on Indian commerce is consistent with prior law, the national character of Indian commerce and the federal objects and purposes to be served in furthering the economic development of the reservation Indians. Only such a determination will prevent a direct conflict with federal regulation of Indian commerce and federally approved Indian regulation of Indian commerce.

For the foregoing reasons, it is respectfully submitted that the judgment of the Arizona Supreme Court should be reversed and that the licensing and imposition of the Arizona Privilege Tax upon Indian traders for the privilege of making sales on the Indian reservations to reservation Indians, pursuant to Arizona Revised Statutes §§ 42-1308.A and 42-1312.A and the Arizona Tax Commission's Regulation 2.18.5, should be held to violate that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."

Edward Jacobson
Attorney for Appellant

November 25, 1960

Appendix A

[redacted]

[redacted]

Constitutional Provisions, Statutes and Regulations A1

United States Constitution A1

United States Statutes A1

Federal Regulations A5

Arizona Enabling Act A22

Arizona Constitution A23

Arizona Revised Statutes A25

Arizona Tax Commission Regulations A26

APPENDIX A

Constitutional Provisions, Statutes and Regulations

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264:

§ 261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289. § 5, 19 Stat. 200.

§ 262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994. § 10, 32 Stat. 1009.

§ 263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications

therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

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61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110:

§ 105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and

power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under

regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

§ 108

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 109

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 110

As used in sections 105-109 of this title —

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States;

and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

Federal Regulations:

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958):

§ 251.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential Prohibition

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

§ 251.3 Forfeiture of Goods

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And*

provided further, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

§ 251.5 Government employees not to trade with Indians except in certain cases

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided,* That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further,* That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with

the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States Employees, Indian blood.* Indian employees of the United States Government, of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue in-

fluence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U.S.C. 68a, 87a, 441)

§ 251.6 Small Purchases

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

§ 251.8 Regulating Sale of Arms and Ammunition

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.9 Application for License

Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 5-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

§ 251.10 Bond Requirements

(a) Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U.S.C. 6-13). The bond shall be for the same period covered by the license.

(b) The residence of each principal and surety must be distinctly stated, and the signature of each of them attested by two witnesses, and it must appear for whom each witness signs.

(c) Individual sureties must not be bonded officers of the United States, attorneys having business before the Bureau of Indian Affairs, or employees of the principal.

§ 251.11 License Period

No license will be granted for a longer period than 1 year; but at the end of that time, if the Commissioner of Indian Affairs is satisfied that the trade has been conducted properly and that the laws and regulations and terms of the license have been duly observed, a new license may be granted.

§ 251.12 License Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 251.13 Power to Close Unlicensed Stores

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration

of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 251.14 Trade Limited to Specified Premises

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 251.15 License Applicable for Trading Only by Original Licensee

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 251.16 Trade in Annuities or Gratuities Prohibited

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owner or possessors

of the cattle belong, except with the written consent of the agent of said tribe.

§ 251.17 Tobacco Sales to Minors

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 251.18 Intoxicating Liquors

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 251.19 Drugs

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 251.21 Gambling

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 251.22 Inspection of Traders' Prices

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of

employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at Traders' Risk

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash Payments Only to Indians

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 251.25 Trade in Antiquities Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 251.26 Infectious Plants

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

§ 252.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes.

Any person desiring to trade with the Indians of the Navajo, Zuni, and Hopi Reservations may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Comimssioner of Indian Affairs may prescribe.

§ 252.2 Presidential Prohibitions

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or any particular articles, into the country belonging to the Navajo, Hopi, and Zuni Indians and to direct that all licenses to trade with such tribes be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe or members of any other tribe residing on the Navajo, Zuni or Hopi Reservations.

§ 252.3 Forfeiture of Goods

Any person whether Indian or white who shall establish himself as a trader within the exterior boundaries of the Navajo, Hopi, or Zuni Reservations, or introduce goods or trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession and shall moreover be liable to a penalty of $500.

§ 252.4 Government Employees Not to Trade with Indians

No person employed by the United States Government shall have any interest or concern in any trade with the Indians, except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.

§ 252.5 Purchase in Small Quantities Allowed

This purchase in small quantities for home use or consumption by Government employees or others, of blankets,

baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

§ 252.6 Application for License

Application for license or renewal of license must be made in writing on a form provided by the Commissioner of Indian Affairs, setting forth the full name and residence of the applicant and three responsible references. If applicant is a firm, the firm name and the name of each member thereof; the place where it is proposed to conduct the trading post; and upon the request of the superintendent, the capital invested or to be invested and of this the amount of capital owned and the amount borrowed, or to be borrowed; the name of the lender of the borrowed capital; the date due, the rate of interest to be paid; indorsers and security; copy of any contract or trade agreement, or agreements, oral or written, with creditors or financing individuals or institutions, including any stipulations whereby financing fees are to be paid, directly or indirectly, tending to restrict the trader as a bargainer in the wholesale markets or otherwise to increase the delivered wholesale costs of merchandise at the trading posts. Application must be accompanied by satisfactory evidence as to the character, experience, and business ability of applicant and his employees and their general fitness to reside on the Indian reservation. All such information shall be considered as confidential. No employee in the Government service shall exert undue influence, direct or indirect, to help any applicant secure a license.

§ 252.7 Records, Reports and Obligations of Traders

(a) Each trader shall keep in a form approved by the Commissioner of Indian Affairs accurate records of his business activities and render annually not later than March 1 a report to the superintendent showing capital investment, increases and withdrawals, whether in the form of cash, mer-

chandise, or other property; the value of buildings and improvements, furnishings and fixtures, miscellaneous assets such as automobiles, trucks, or other property essential to the business; a complete record of all liabilities, including accounts, bills and notes payable, and the amount of cash received and disbursed, balances, whether on hand, on deposit, or due the store; the accounts, and notes receivable, and the pawns of pledges taken. The names and respective interests of all persons participating in the business shall be furnished.

(b) The price of all articles of merchandise placed on sale shall be plainly and visibly marked by the trader.

§ 252.8 Licensee; Owner of Trading Post

A licensee of a trading post shall be the owner of the business. He shall be responsible to the Commissioner of Indian Affairs for the entire operation of the trading post, including acts of commission or omission of his employees, and for reports required by the Commissioner of Indian Affairs.

§ 252.9 Bond Requirements

Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the superintendent or the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

§ 252.10 License Period

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the permit or lease held by the licensee on restricted Indian land. The license period in no

event shall exceed 25 years. Licenses for periods not to exceed 10 years may be issued by the area director.

§ 252.11 Application for Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on a form prescribed by him, through the superintendent, at least 3 months prior to expiration of the existing license, and the superintendent must report to the Commissioner of Indian Affairs as to the record the applicant has made as a trader and his fitness to continue under such a license.

§ 252.12 Temporary Permits

No trader shall carry on trade with the Indians without a license, or continue to trade with the Indians after the expiration of the license. A temporary license for 3 months may be issued by the Commissioner of Indian Affairs, or his duly authorized representative, pending consideration of application for renewal of license. In case the trader has neither a temporary permit nor a renewal of license, the Commissioner of Indian Affairs or his duly authorized representative is authorized to close the trading post of such trader. Upon the approval of the tribal council concerned, a trader may be granted the use of not to exceed eight acres of tribal land as a site for a trading post, corrals and other buildings required in connection with the business.

§ 252.13 Trade Confined to Licensed Premises

All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent.

§ 252.14 Subleasing; Livestock Herding Prohibited

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the

Commissioner of Indian Affairs, and the consent of the tribal council concerned. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation or in conjunction with Indians.

§ 252.15 Gambling Prohibited

Gambling, by dice, cards, or in any way whatever including any mechanical device is strictly prohibited in any licensed trader's store or on the premises.

§ 252.16 Security

(a) Traders may accept pawns or pledges of personal property for security of accounts due to them by Indians. Traders shall be liable for the market value of all pawns or pledges held by them. The market value shall be settled by agreement between the Indian and the trader at the time of the transaction. In all cases where pawns or pledges are accepted by the trader a written receipt shall be given the Indian showing (1) the date of the transaction, (2) the nature of the pawn or pledge, (3) the amount loaned thereon, and (4) its market value as agreed upon between the Indian and the trader. A pawn or pledge not redeemed within 11 months shall be displayed in a conspicuous place in the trader's store for a period of 30 days together with a notice stating that unless the amount due, which shall be specified, is paid before the expiration of the 30 days, such pawn or pledge will be forfeited. At the expiration of 12 months from the date of the original loan, a pawn or pledge not redeemed shall become the property of the trader, in which event the amount due shall be cancelled on the trader's books. Notice of such cancellation shall be given in writing to the interested Indian.

(b) On the Navajo Reservation the period for the redemption of a pawn or pledge shall be 6 months unless at least 30 days prior to the expiration of such period not less

than 25% of the amount due has been paid, in which case the redemption period shall be 8 months; an additional period of 2 months shall be added to the redemption period for every additional 25% of the amount due that may be paid. The provisions of paragraph (a) of this section with respect to display, forfeiture, and payment within any 30 day period of grace, shall be applicable also to pawns or pledges taken on the Navajo Reservation.

§ 252.17 Credit at Trader's Risk

A trader may extend credit to Indians, but such credit will be at the trader's own risk. All payments to Indians for products or labor must be made in lawful United States money or in credit on the traders' books at the option of the Indian. Receipt must be given Indians for all articles they have sold to traders and on which they have requested book credit. These receipts must show the following information: (a) the date the transaction was made, (b) the amount paid the Indian, and (c) a description of the article or articles sold. All receipts issued by the trader for Indian products must be recorded in the trader's books in such manner that all information contained in the receipt is duplicated. Receipts may be transferred upon order of the initial recipient if it is to his convenience that such a procedure be followed.

§ 252.18 Government Checks Paid in Cash

Traders must pay all Government checks accepted in cash, merchandise or credit to the full value of the check presented. The acceptance of cash, merchandise, or credit for Government checks shall be at the option of the Indian in all cases.

§ 252.19 Premises Kept in Sanitary Condition

The traders shall keep both their premises and places of business in a clean, sanitary, and presentable condition at all times and shall avoid exposure of foodstuffs to infection from the air, dust, insects or handling. It shall be the duty of

the health officer of the reservation and their assistants to make periodical inspections, recommend improvements, and report thereon to the Commissioner of Indian Affairs or his duly authorized representatives.

§ 252.20 Traders' Responsibility

Traders shall be kept responsible through bond for any loss of Indians' property in their possession, including credit on books.

§ 252.21 License Fee

(a) An annual license fee of $50.00 shall be paid in advance by all licensed traders who are not members of the Navajo, Zuni, or Hopi Tribes. The area director shall determine the amount of such license fee to be paid by licensees who are members of the Navajo, Zuni, or Hopi Tribes. No such annual license fee shall exceed $50.00. All fees shall be deposited to the credit of the account "Indian Moneys, Proceeds of Labor, Navajo Agency (or Hopi or United Pueblos Agency)" and may be expended by the administrative official in the enforcement of the regulations in this part.

(b) On the Navajo Reservation, this license fee shall be paid on the basis of a calendar year regardless of any change in ownership of the business covered by the license unless the license be canceled for cause. When a license is issued following the cancellation of a license for cause or when a new business is established after the beginning of a calendar year, the license fee shall be determined on a quarterly basis, but the quarterly fee of $12.50 shall be charged also for a fraction of any quarter of a year. A transfer fee of $5.00 shall be collected whenever an unexpired license is transferred or assigned during a calendar year to a new owner of a trader's business.

(c) Deposits made by a temporary licensee under this part as provided by § 252.12 shall be refunded in the event a license is not issued unless the temporary licensee conducts

a trading business during the period of temporary operation in which event the temporary licensee shall be charged a fee on a quarterly basis for the period during which the business was conducted and the balance of the deposit shall be refunded.

§ 252.22 Grants and Donations Prohibited

No licensed trader shall be permitted to grant or donate any money or goods to the performance of any Indian dance or ceremony.

§ 252.23 Introduction of Livestock Prohibited

The introduction of livestock by traders or others into the Navajo, Hopi, and Zuni Reservations is prohibited except by special permit issued by the superintendent.

§ 252.24 Trade in Antiques Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 252.25 Imitation Indian Crafts Prohibited

It shall be forbidden for any person to introduce or have in his possession for disposition or sale to Indians or others, within the exterior boundaries of the forementioned reservations, any Indian arts and crafts, which are, according to established standards, imitation or spurious. Violators may be punished at the discretion of the superintendent.

§ 252.26 Sunday Trading

Traders shall not keep their places of business open on Sundays. However, this shall not be construed as prohibiting traders from accommodating travelers or Indians coming from a distance to trade in case of emergency.

§ 252.27 Purchase of Annuities and Gratuities Goods Prohibited

Traders are forbidden to buy, trade for, or have in their

possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians, may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the livestock belong, except by special permit issued by the superintendent.

§ 252.27a Amusement Companies

All carnival companies, circuses, theatrical companies, all persons, firms or companies conducting or operating portable dance pavilions, mechanical devices such as ferris wheels, carousels, or other devices for carrying passengers, and all persons operating games of skill, shall be considered traders and shall be required to obtain a license and to pay such fees as may be prescribed by the superintendent in charge of the jurisdiction, based on the number and class of devices or units to be operated (not less than $5.00 nor more than $25.00 per unit); and shall post a surety bond in an amount not exceeding $10,000.00 and a personal injury and property damage liability bond of not less than $500.00 nor more than $20,000 as may be required by the superintendent.

§ 252.27b Peddlers

All itinerant peddlers or purveyors of foodstuffs or other merchandise shall be considered traders and shall be required to obtain a license or permit from the superintendent setting forth the class of trade or peddling to be carried on; shall pay such fee as may be prescribed by the superintendent, and shall post such surety bond (not less than $500.00 nor more than $10,000.00) as may be required by the superintendent.

§ 252.27c Fees of Governing Body

The fees prescribed by these regulations shall not be considered as precluding the governing body of any Indian res-

ervation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate.

§ 252.28 Amendments

The regulations in this part are subject to change and addition with reasonable notice, at the discretion of the Commissioner of Indian Affairs. The trader is subject to revocation of license, and forfeiture in whole or in part of bond in the event of any violation of the regulations in this part.

Arizona Enabling Act, § 20, Second, 36 Stat. 569

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be

exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Arizona Constitution, Article XX, Fourth and Fifth

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Fifth. The lands and other property belonging to citizens of the United States residing without this State shall never be taxed at a higher rate than the lands and other property situated in this State belonging to residents thereof, and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian; but nothing herein shall preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress. As amended, election May 31, 1927, eff. June 27, 1927.

Arizona Revised Statutes

§ 42-1301

In this article, unless the context otherwise requires:

* * *

2. "Business" includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.

6. "Engaging", when used with reference to engaging or continuing in business, includes the exercise of corporate or franchise powers.

• • •

8. "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

• • •

11. "Person" or "company" includes individual, firm, partnership, joint adventure, association, corporation, municipal corporation, estate, trust or any other group or combination acting as a unit, and the plural as well as the singular number.

• • •

13. "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes:

(a) Any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(b) The fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property.

14. "Sale at retail" means a sale for any purpose other than for resale in the form of tangible personal property, but "transfer of possession", "lease" and "rental" as used in the definition of "sale" means only such transactions as are found upon investigation to be in lieu of sales as defined without the words "lease or rental."

15. "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the senses.

§ 42-1305 Rule Making Power of Commission

The commission is authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this article.

§ 42-1308

A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1.

§ 42-1309

A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales,

or gross income, as the case may be, in accordance with the schedules as set forth in §§ 42-1310 through 42-1313.

§ 42-1312

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

1. The sale of stocks and bonds.

2. Professional or personal service occupations, or businesses which involve sales or transfers of tangible personal property only as inconsequential elements thereof.

3. Services rendered in connection with or in addition to the sale of tangible personal property at retail by businesses or occupations other than those to which subdivisions (a) through (h) of paragraph 2 of § 42-1310 and § 42-1311 are applicable.

Arizona Tax Commission Regulation 2.18.5

Trading Posts on Indian Reservations. A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction.

APPENDIX B

Papago Tribal Council Ordinances and "No Objection" Letters

ORDINANCE No. 43

WHEREAS, the State of Arizona has no jurisdiction to impose a sales tax (transaction privilege tax) on sales between Traders located on the Papago Indian Reservation and Indians, and

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to make this tax applicable in all instances where the previous sales tax imposed by the State of Arizona applied. The *Arizona Revised Statutes* § *42-1301*, § *42-1347* shall be used as a reference in determining the applicability of the sales tax in question on

the Papago Reservation. The Arizona Revised Statutes are used solely for the purpose of illustration and reference and not adopted as such.

Section 3. Each of the Traders shall withhold from the total tax collected three per cent (3%) for the purpose of remitting said three per cent (3%) to the State of Arizona in compliance with the Arizona Revised Statutes covering transaction privilege taxes. The remaining ninety-seven percent (97%) of the total tax collected shall be forwarded by each of the Traders to the Papago Tribe, the collection period to be each and every calendar month with payment of the tax to the Tribe on or before the 15th day of the month following the collection period.

Section 4. It is the intention of this ordinance to comply with the law of the State of Arizona where applicable. Therefore, the three per cent (3%) that will be sent to the State of Arizona represents that proportion of non-Indian business that is transacted with the Traders on the reservation.

Section 5: It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 6. The effective date of this ordinance is July 1, 1963.

Section 7. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 8. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 9. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regu-

lations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 10. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 12th day of July, 1963, duly enacted by a vote of 17 for, 0 against, and 5 not voting, by the Papago Council, pursuant to authority vested in it by Section 3 (a), Section 3 (d), Section 3 (e) and Section 3 (h) of Article V of the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of the Interior on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984). Said ordinance is effective as of July 1, 1963 after its approval by the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

By: Eugene J. Johnson
Eugene J. Johnson, Tribal Chairman

ATTEST:
Mary Jane Vasquez
Tribal Treasurer

APPROVED:
July 22, 1963

(Sgd.) Martin J. Steinwand
Acting Superintendent
Thomas H. St. Clair, Superintendent.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON 25, D. C.

In Reply Refer to:
Law and Order
5910-63
Oct. 11, 1963

Through: Area Director, Phoenix
Mr. Eugene J. Johnson
Chairman, Papago Council

Dear Mr. Johnson:

On July 12, 1963, the Papago Council enacted Ordinance No. 43 for the purpose of imposing a sales tax on goods sold within the Papago Reservation. Pursuant to Section 6, Article V, of the tribal constitution, the ordinance is subject to review by the Secretary of the Interior.

The ordinance provides for imposition of a 3% sales tax on traders doing business on the reservation. It is patterned after the laws of Arizona. The council has estimated that 97% of the business of traders on the reservation is with Indian people and the remaining 3% is with non-Indians. The ordinance provides, therefore, that 97% of the taxes withheld by the traders shall be payable to the tribe, and that the remaining 3% may be paid to the state.

Pursuant to the authority delegated by Secretarial Order No. 2508, as amended (19 F. R. 4585), we have carefully reviewed Ordinance No. 43 and find no reason which would prompt us to recommend its rescission by the Secretary of the Interior. Ordinance No. 43 is in full force and effect, therefore, as of the date of the Superintendent's approval.

The purpose and intent of the ordinance could be more clearly stated. This matter has been discussed by telephone recently with

Mr. Edward B. Berger, tribal attorney, and we understand he will suggest that a clarifying ordinance be enacted by the council.

The original of Ordinance No. 43 is returned.

Sincerely yours,

Enclosure

Commissioner

ORDINANCE No. 44

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation. as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the Welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three percent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 3. The effective date of this ordinance is October 21, 1963.

Section 4. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 5. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 6. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 7. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 11th day of October, 1963 duly enacted by a vote of 15 for and 0 against by the Papago Council, Pursuant to authority vested in it by Section 3(a), Section 3 (d), Section 3 (e) and Section 3 (h) of Article V of the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of the Interior on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Star. 984). Said ordinance is effective as of October 21, 1963 after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6 Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

By: Eugene J. Johnson
Eugene J. Johnson, Tribal Chairman

ATTEST:
Claudina R. Chavez
Claudina R. Chavez, Secretary

APPROVED:
October 21, 1963.
Thomas H. St. Clair
Thomas H. St. Clair, Superintendent

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON 25, D. C.

In Reply Refer to:
Law and Order
7937-63

Dec. 9, 1963

Through: Area Director, Phoenix
Mr. Eugene J. Johnson
Chairman, Papago Council

Dear Mr. Johnson:

On October 11, 1963, the Papago Council enacted Ordinance No. 44 for the purpose of imposing a sales tax on goods sold within the Papago Reservation. Pursuant to Section 6, Article V, of the tribal constitution, the ordinance is subject to review by the Secretary of the Interior.

The ordinance provides for an imposition of a 3% tax upon the gross receipts of all sales made within the confines of the Papago Reservation. It also provides that all resolutions, ordinances, or other provisions in conflict with the provisions of Ordinance No. 44 are rescinded. On October 11, 1963, we favorably reviewed Ordinance No. 43, enacted by the council on July 12, 1963, which also provided for the imposition of a sales tax on goods sold within the reservation. Certain provisions of Ordinance No. 43 which appeared unclear were discussed with Mr. Edward B. Berger, tribal attorney, before favorable review was given to this ordinance, and it was suggested that a clarifying ordinance be enacted by the council. Ordinance No. 44 was enacted to clarify the previous ordinance.

Section 2 of the ordinance provides that it is applicable to all business activities of "all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers." We construe

this language to mean that the ordinance is applicable to traders, peddlers, dealers or canvassers *individually or as agents* of dealers, supervisors or employers. On this understanding, and pursuant to the authority delegated by Secretarial Order No. 2508, as amended (19 F.R. 4585), we have reviewed Ordinance No. 44 and find no reason which would prompt us to recommend its rescission by the Secretary of the Interior.

The original of Ordinance No. 44 is returned.

Sincerely yours,
(Sgd) John O. Crow
Deputy Commissioner